No. 10727

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN R. HALEY, as Administrator of the Estate of George Salter, deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

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THURBER'S HELENA

Subject Index

Table of Decisions and Statutes

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I.
JURISDICTION OF THE DISTRICT COURT AND OF THIS COURT

This is an action by the Administrator of the estate of a deceased soldier upon a policy of War Risk Term Insurance issued by the United States under the War Risk Insurance Act of October 6, 1917.

Actions upon this insurance are authorized, and jurisdiction to try such actions is conferred upon the District Court of the United States, by

Section 445, Title 38, U. S. C.

That section also empowers the United States Circuit Courts of Appeal to review such actions on appeal.

This suit was brought within 90 days after disagreement, as permitted by

Section 445d, Title 38, U. S. C.

The pleadings and facts upon which jurisdiction in this case is based are analyzed in detail in the "Statement of Facts" immediately following.

II.
STATEMENT OF FACTS

(a) PLEADINGS:

On October 10, 1930, Ella May Stanton, as administratrix of the estate of George Salter, deceased, filed suit upon the policy of insurance held by deceased. (See defendant's Exhibit 10)

A fourth amended complaint was filed in that action. (Tr. pp. 70, et seq.)

The defendant demurred upon two grounds: first, that the complaint did not state a cause of action, and second, that the allegations of a disagreement were ambiguous, uncertain and unintelligible. (Tr. pp. 77-78)

This demurrer was by the Court sustained (Tr. p. 78) and the action was dismissed on February 11, 1936, because of the failure of the plaintiff to further amend, there being no trial upon the merits.

The judgment of dismissal was, apparently through inadvertence, omitted from the printed record, but it was in the original record filed in this Court. Counsel for defendant will doubtless admit these facts.

Counsel for plaintiff, being convinced that there had been no sufficient denial of the claim of plaintiff by the Veterans Administration, instituted proceedings in the District of Columbia to compel final action by the Veterans Administrator, with the result that the latter issued his letter of denial on January 19, 1937. (Par. VII of amended complaint, Tr. pp. 17-20)

On February 4th, 1937, plaintiff (appellant here) filed the present action. In the original complaint John and Peter Salter, supposed heirs of the deceased, were joined with Haley, the administrator, as plaintiffs. (Tr. p. 2)

Counsel concluding as the result of further inquiry instituted by him that the finding of heirship by the district court of Silver Bow County was erroneous because of the confusion of two George Salters, which fact was conceded by these supposed heirs, the amended complaint, upon which the issues were framed, was filed by John R. Haley, administrator, alone. (Tr. p. 12)

Facts Alleged in Amended Complaint:

The amended complaint alleges:

The appointment of Ella May Stanton as administratrix of the estate of George Salter by the district court of Silver Bow County, Montana, and the substitution of plaintiff as administrator on June 2, 1934; (Par. I, Tr. p. 12)

The death of George Salter on October 4, 1918, while a resident of Silver Bow County, Montana; (Par. II,, Tr. p. 13)

The allowance by the probate court of creditors claims aggregating $1748.00, and administration costs of $1408.81; (Par. III, Tr. pp. 13-15)

That said George Salter was inducted into the military service of the United States on or about April 25, 1918, with the grade of private, and served under the War Department in the infantry from said date until his death on October 4, 1918; that deceased was then a legal resident of Silver Bow County, Montana; (Par. IV, Tr. pp. 15, 16)

That he was granted by the United States $10,000 of War Risk Term Insurance and that the monthly premiums were deducted from his pay during the entire term of his service under the War Department; (Par. V, Tr. p. 16)

That said insurance was made payable to the estate of said soldier, was in good standing at the time of his death on October 4, 1918, and thereupon passed to his estate; (Par. VI, Tr. p. 17)

That beginning with March 5, 1930, the administratrix and administrator aforesaid made demand of the Veterans Bureau and of the Veterans Administrator for the benefits of said insurance, but that final action upon such demands was not obtained until a writ of mandate was petitioned for by said Haley, administrator of said estate, in the Supreme Court of the District of Columbia; that thereafter, by letter dated January 19, 1937, and received by the plaintiff about January 23, 1937, the Veterans Administrator denied said claims; (Par. VII, Tr. pp. 17-20)

That the estate of George Salter, deceased, is entitled to $4,004.59 of said insurance to pay said creditors claims

and expenses of administration; (Par. VIII, Tr. pp. 20-21)

Prayer is for judgment for that amount. (Tr. p. 21)

Answer:

The answer of the government

Admits that George Salter died on October 4, 1918, intestate, and leaving no heirs or next of kin entitled to distribution of his estate; (Par. II, Tr. p. 22)

Admits that George Salter applied for and was granted a $10,000 contract of war risk term insurance on May 6, 1918; (Par. V, Tr. p. 23)

And that this insurance was in full force and effect at the time of the death of George Salter; and that he named himself as beneficiary; (Par. VI, Tr. p. 23)

Puts in issue by denials the other allegations of the amended complaint. (Tr. pp. 22, 23)

The cause came on for trial before the Court on November 14, 1941, both parties waiving a jury trial. (Tr. p. 24)

(b) EVIDENCE INTRODUCED AT TRIAL:

Evidence was introduced upon all issues, particularly:

1. The appointment and capacity of plaintiff as administrator of the George Salter estate. This proof was admitted without objection. (Tr. pp. 25-28)

2. The induction of George Salter into the United States Army on April 25, 1918, and his honorable service

therein until October 4, 1918, when he was killed in action; this being admitted by defendant; (Par. IV of Answer, Tr. p. 22, Tr. pp. 28-29)

3. That at the time of the trial there were no known relatives, which is admitted in the answer; (Par. II of Answer, Tr. p. 22, Tr. p. 28)

4. That George Salter was at the time of his induction a resident of Silver Bow County, Montana (this proof being admitted without objection by defendant); (Tr. pp. 29-30)

5. Disagreement was admitted by the defendant, also that the suit was filed in time; (Tr. p. 31)

6. That deceased was killed in action on October 4, 1918; (Par. IV of Answer, Tr. p. 22, Tr. pp. 31-32)

7. The filing and allowance of creditors claims in the Salter estate; (Tr. 33-39, Pltff's Exhibits Nos. 7 and 8)

8. The allowance of administration costs; (Tr. pp. 39-48, Pltff's Exhibit 9)

9. The fact that there was no property in the estate but this insurance; (Tr. pp. 33, 49)

10. The insurance contract is admitted in the answer (Par. V, Tr. p. 23) and it is also admitted that it was in full force and effect at the time of Salter's death; (Par. VI of Answer, Tr. p. 23)

(c) FINDINGS OF FACT AND CONCLUSIONS OF LAW:

On September 14, 1942, the District Court made and filed its findings of fact and conclusions of law. (Tr. pp. 88-89)

Findings of Fact:

The Court found as facts,

1. That the plaintiff is the duly qualified and acting administrator of the estate of George Salter, Deceased.

2. That George Salter was inducted on April 25, 1918.

3. That he was granted $10,000 of insurance, payable to himself, and which was in good standing when he was killed.

4. That he was killed in action October 4, 1918, was a resident of Montana at the time of his death, died intestate, and without known heirs or next of kin. (Tr. pp. 88-89)

These findings of fact cover every issue of fact in this case except the allowance of creditor's claims and expenses of administration.

Conclusions of Law:

The Court found as a conclusion of law that it had jurisdiction of this case, but found further that the complaint should be dismissed upon the merits. (Tr. p. 89)

The District Court entered judgment dismissing the action. (Tr. pp. 90-91)

(d) PROCEEDINGS SUBSEQUENT TO JUDGMENT:

On September 24, 1942, the plaintiff (appellant here) filed his

MOTION TO AMEND AND MAKE ADDITIONAL FINDINGS OF FACT AND TO AMEND THE JUDGMENT ACCORDINGLY

(Tr. pp. 91-94)

On September 24, 1942, the plaintiff (appellant here) filed his

MOTION TO SET ASIDE DECISION AND FOR JUDGMENT FOR PLAINTIFF, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

(Tr. pp. 95-97)

On October 29, 1943, the District Judge, the Honorable Charles N. Pray, filed his order overruling these two motions. (Tr. pp. 97-98)

On January 20th, 1944, plaintiff's attorneys filed notice of appeal (Tr. p. 99) and bond for costs on appeal (Tr. pp. 100-101)

On January 21, 1944, counsel for appellant filed their designation of contents of record on appeal. (Tr. p. 102)

On April 7, 1944, the record on appeal, duly certified by the Clerk of the District Court, together with designation of parts of the record to be printed, were filed with the clerk of this Court. (Tr. pp. 104-107)

III.
SPECIFICATION OF ERRORS

1. The District Court erred in holding that under the provisions of Section 514, Title 38, U. S. C., the insurance was not payable to the said estate of George Salter, deceased;

2. The District Court erred in holding that under Section 454a, Title 38, U. S. C., the insurance was exempt from the claims against the estate of George Salter, deceased;

3. The District Court erred in not holding that sufficient of said insurance to liquidate claims against said

estate and expenses of administration was payable to plaintiff (appellant) as administrator of said estate;

4. The District Court erred in holding that the amended complaint should be dismissed upon the merits;

5. The District Court erred in entering judgment dismissing the action.

6. The District Court erred in not entering judgment in favor of the plaintiff for the amount of the claims established against the estate of George Salter, deceased, plus the expenses of administration;

7. The District Court erred in denying plaintiff's motion to amend the findings, make additional findings, and amend the judgment accordingly.

8. The District Court erred in denying the motion of plaintiff to set aside the decision and judgment and enter judgment for plaintiff, or alternatively, to set aside the judgment and grant a new trial.

9. The District Court erred in admitting in evidence the judgment roll in the former case, No. 1429, and in following a ruling of Judge Bourquin upon a demurrer to an amended complaint in that action.

IV.
FACTS ESTABLISHED

Briefly stated, George Salter, a soldier serving in the armed forces of the United States in World War No. 1, holding a war term policy for $10,000, payable to himself or to his estate, was killed in action, leaving no will, no known heirs, and no assets except this insurance. His estate is being administered by the plaintiff in the probate

court of Silver Bow County, Montana, and debts and expenses of administration have been allowed by that court.

Appellant sues for enough of this insurance to pay these debts and expenses.

V.
CONTENTION OF PARTIES

Appellant contends that he is entitled to recover upon the facts established, while appellee asserts that the government is exempt from the payment of any of this insurance under the provisions of Sections 454a and 514, Title 38, U. S. C., and at the trial objected to the introduction of proof of the allowance of claims in the estate, and moved for judgment consistently with these objections.

VI.
ARGUMENT

The findings of fact made by the District Court (Tr. pp. 88-89) entitled the plaintiff to judgment unless it should appear that the insurance would escheat.

Under the facts, and under the law of this jurisdiction, the money prayed for would not escheat, and plaintiff is entitled to judgment, as we will now proceed to demonstrate.

(a) The Law Applicable to the Case at Bar

Since the amendment of March 4, 1925, the law defining the obligation of the government under these War Risk Insurance Policies, under the circumstances of this case, has been and still is as follows:

> "If no person within the permitted class be designated as beneficiary for yearly renewable term in-

surance by the insured either in his lifetime or by his last will and testament * * * *there shall be paid to the estate of the insured* the present value of the monthly installments thereafter payable. * * * In cases when the estate of an an insured would escheat under the laws of the place of his residence the insurance shall not be paid to the estate but shall escheat to the United States and be credited to the military and naval insurance appropriation." (Italics ours.)

Sec. 514, Title 38, U. S. C.

This amendment came before the United States Supreme Court in 1932, in the case of

Singleton vs. Cheek,
284 U. S. 493,
76 L. ed. (U. S.) 419,
52 S. Ct. 257

where the Court said:

"By that amendment, the rule, upon which the happening of the contingencies named in the prior acts, limited the benefit of the unpaid installments to persons within the designated class of permittees, was abandoned, *and the 'estate of the insured' was wholly substituted as the payee.* All installments, whether accruing before the death of the insured or after the death of the beneficiary named in the certificate of insurance, as a result, *became assets of the estate of the insured as of the instant of his death,* to be distributed to the heirs of the insured *in accordance with the intestacy laws of the state of his residence.*"

In 1933 this Court had before it the same substantive questions as are presented here, in the case of

Brown vs. U. S.,
65 Fed. (2nd) 65.

In that case the soldier had made a nuncupative will by which he bequeathed his entire estate to Brown and his wife. The will was admitted to probate in the state probate court, and Brown was appointed administrator. Evidently the probate court did not limit the besquest to $1,000.00 as provided by the California statute.

Brown, the administrator, applied to the Veterans' Bureau for the insurance, and his application being denied, he sued in the District Court of the United States for the Southern District of California. During the pendency of this suit the United States attorney petitioned the probate court to set aside the probate of this will, but the petition was denied.

The insurance suit was later tried, resulting in judgment for the government upon the ground that the probate court lacked jurisdiction, and that its decree admitting the will to probate was void; apparently upon the same theory as that advanced by counsel for the government in that case, namely, that the conditions contained in Sections 1289 and 1290 of the California Code were jurisdictional.

In fact, it appears from the opinion in the Brown case that the whole contest pivoted upon the question of the jurisdiction of the state probate court—a fact which makes the decision of this Court of the greatest significance.

After analyzing the decision of the Supreme Court in the case of

> Singleton vs. Cheek,
> 284 U. S. 493,
> 76 L. ed. (U. S.) 419,

and quoting from the opinion, this Court said:

> "This statement clearly indicates that any of the insurance money that thus becomes payable to his estate must be *distributed as his general estate is distributed.*"

Upon the question of jurisdiction this Court then said:

> "So far as the record shows, there can be no doubt that the state court had jurisdiction over decedent's estate. *Its decree is therefore free from collateral attack.*"

The Court held that under the California law the bequest must be limited to $1000, and then laid down the following propositions, all of which apply directly to the case at bar:

> 1. That the limitation contained in Section 514 applies only to the portion of the insurance that would escheat;
>
> 2. That "before distribution, administration expenses and claims allowed against the estate must be paid. *The balance only would escheat.*"
>
> 3. That "the obligation of the government, therefore, is measured by the $1000. for the legacy, *plus the sum required for the claims allowed and the administration costs*, less the value of any other property in the estate." (Italics ours)

It is to be noted that the obligation to pay the amount of the debts and expenses is not contingent upon, *but is in addition to,* the obligation to pay the legacy. In other words, the obligation to pay the amount of these debts and expenses is an independent obligation.

This is the law of the Ninth Circuit, and applies with full force to the facts in the case at bar.

No question of the jurisdiction of the district court of Silver Bow County over the estate of George Salter has been raised by the appellee.

The state district courts have jurisdiction over "all matters of probate."

Mont. Const., Art. VIII, Sec. 11.

Letters of administration must be granted "in the county in which the decedent was a resident at the time of his death, in whatever place he may have died."

Sec. 10018, Rev. C. Mont., 1935.

> "All the property of the decedent shall be chargeable with the payment of the debts of the deceased, the expenses of administration," etc.
>
> Sec. 10195, Rev. C. Mont., 1935.

Chapters 108 to 144 of said Codes provide the procedure for the administration of estates.

All these or similar provisions have been in force in Montana since its admission to the Union in 1889.

The Montana Codes also provide that

> "Whenever the title to any property fails for want of heirs or next of kin, it reverts to the State."
>
> Sec. 28, Rev. C. of Mont., 1935.

This reversion takes place, however, only as to the property remaining after the payment of claims and administrative costs.

Sec. 10195, Rev. C. Mont., 1935, quoted above.

Eliminating from consideration the $1000. legacy involved in the Brown case, we find the facts and the law in that case to be the same as here.

(b) Section 454a Is an Exemption Statute, Applicable Only After Payment of Insurance, and Is Not a Defense to Payment in the First Instance

It would be unnecessary to pursue this discussion further were it not that the appellee sets up Sec. 454a, Title 38, U. S. C., as a defense, notwithstanding Section 514, the only section having to do with the right of recovery in the first instance, contains the only defense to payment—*escheat.*

Section 454a provides that:

> "Payments of benefits due or to become due shall not be assignable, and *such payments made to, or on account of*, a beneficiary under any of the laws relating to veterans shall be exempt * * * from the claims of creditors." (Italics ours)
>
> Sec. 454a, Title 38, U. S. C.
> Act of Aug. 12, 1935, 49 Stat. c. 510.

Section 22 of the World War Veterans Act of June 7, 1924, before amendment by the Act of Aug. 12, 1935, read as follows:

> "That the compensation, insurance, and maintenance and support allowance payable under Title II, III and IV, respectively, shall not be assignable, shall not be subject to the claims of creditors of any person to whom an award is made under Titles II, III, or IV."
>
> Sec. 22, Act of June 7, 1924 (then Sec. 454, Title 38, U. S. C.)

The Supreme Court had this section before it for construction in

> Pagel vs. Pagel,
> 291 U. S. 473,
> 78 L. ed. (U. S.) 921.

In that case the heirs of the deceased soldier, to whose estate the balance of the insurance had been paid after the death of the beneficiary, were claiming as heirs of the soldier and not as designated beneficiaries. They claimed exemption from the claims of creditors of the estate and from expenses of administration. Claims of creditors and administrative costs had been allowed to the amount of about $3800.00, and the other assets were insufficient to pay them.

The Court said:

> "The purpose of the exemption, Sec. 454 (Sec. 22 of the Act of 1924), is to *safeguard to the insured soldier and the beneficiary payments made under the policy to them or for their benefit.*" (Parenthetical note and italics ours)

Holding that the exemption applied only to the soldier or his designated beneficiaries, and not to those who became beneficiaries of the insurance through the estate of the soldier, the Court denied the claim of exemption.

The Pagel decision is important in two respects:

First, it defines the purpose of the exemption as being personal to those who receive the insurance. In other words, it is, like the ordinary exemption, available only to one who is about to be deprived of money intended for his personal use, and may be claimed only by such person.

Second, the decision recognizes the applicability of the insurance to the payment of the debts of the deceased soldier, even as against persons who succeed to the insurance, unless the exemption is specifically extended to them.

The amendment of August 12, 1935, by which Section 454a was made to read as that Section now appears in the United States Codes, made no change in the law upon which the Pagel decision was based, except only that it extended the exemption to those to whom payment is made "on account of" the deceased soldier. This amendment was undoubtedly inspired by the Pagel decision, and intended to extend the exemption to heirs who receive the insurance through the estate of the deceased soldier, such as those who were denied the exemption in the Pagel case.

If an heir of George Salter had appeared and established his right as an heir, he could properly raise the question of exemption under Section 454a; but this section provided no *defense to payment*, but has to do only with the disposal of the money *after payment.*

The exemption provision of Section 454a confers a right which lies dormant and inactive until some person coming within the purview of the section sets it up as a defense to a claim against money to which he is entitled for his personal use, *after the money has been awarded and paid.*

The question of exemption cannot arise under the circumstances here until after a payment has been made, and the insurance money has passed under the jurisdiction of the probate court.

It is fair to assume that if Congress had intended, as seems to be the contention of counsel for appellee, that the insurance money should never be used for the payment of creditors or expenses of administration it would have said so. The bare statement of such an intention is much easier made than the various provisions inserted in the different enactments.

When the decision in

Pagel vs. Pagel,
291 U. S. 473,
78 L. ed. (U. S.) 921,

was rendered, Congress simply enlarged the class of persons who could claim the exemption, but did not prohibit the use of the money to pay claims and expenses.

Sec. 454a, Title 38, U. S. C.

While not clear to us, the theory of the government seems to be that the federal court should take over the probate of the estate.

There is no federal statute which gives the Veterans Administration any power to supplant, or interfere with the functions of, the state probate court; and the federal court cannot go farther in a suit on the insurance.

The language of Section 514 is that under the circumstances of this case the money "*shall be paid to the estate of the insured,*" unless it will escheat. Nothing more.

The jurisdiction of the probate court of all matters arising in the administration of the estate is recognized in

Singleton vs. Cheeck,
284 U. S. 493,
76 L. ed. (U. S.) 419,

Pagel vs. Pagel,
291 U. S. 473,
78 L. ed. (U. S.) 921,

in which cases the questions involved were first passed upon by the probate courts and reached the Supreme Court upon certiorari to the State Courts.

The same principle is expressly declared by this Court in the case of

Brown vs. U. S.,
65 Fed. (2nd) 65.

We find no case in which this Court or the Supreme Court has in any way involved the manner of the distribution of the money after payment to the estate with the primary question of the liability of the government to the estate.

VII.
DEFENDANT'S EXHIBIT 10

We find it difficult to determine the government's theory with reference to its Exhibit 10, which is a transcript of the judgment roll in the former case, No. 1429. (Tr. pp. 56 et seq.) Doubtless defendant's counsel will elucidate in their brief.

However, nothing in that Exhibit can have any bearing upon the issues now before the Court for the following reasons:

1. No former adjudication was pleaded in the answer. (See Answer, Tr. pp. 22-23)

2. Judge Bourquin merely held that there was no statute requiring the government to go into the state court; (Tr. p. 70)
a proposition with which we agree.

3. The Court had no jurisdiction in the former action, there being no legal disagreement until after January 19, 1937, long after the dismissal of the former action. (Tr. p. 89)

Disagreement is jurisdictional.

Howard vs. U. S.,
2 Fed. (2nd) 170

Gallardo vs. U. S.,
5 Fed. (2nd) 678

4. The only question arising in the former case was as to the existence of heirs. The question whether claims and expenses of administration were a part of the obligation of the government under the insurance policy was not in that case.

VIII.
CONCLUSION

Clearly, under the law of the Ninth Circuit, which is the only law applicable to this case,

1. The insurance money is payable to the estate of George Salter to the extent that it will not escheat;

2. To the extent of the administrative costs and allowed claims it will not escheat;

3. The decisions of the probate court allowing these costs and claims is not subject to collateral attack; and

4. No question of exemption can arise until after payment to the estate.

We respectfully submit that appellant is entitled to judgment as prayed.

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